Supreme Court, U.S.
FILED

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No. 02-

IN THE

# Supreme Court of the United States

JOHN HANYOK,

*Petitioner,*

*v.*

KATHLEEN HANYOK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF VIRGINIA

## PETITION FOR A WRIT OF CERTIORARI

ROBERT S. GANEY
*Attorney for Petitioner*
7991 Saint Paul's Church Road
P.O. Box 174
Hanover, Virginia 23069
(804) 537-5389

181042

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## QUESTION PRESENTED

Whether § 20-124.2 and § 20-124.3 of the Code of Virginia, 1950, as amended, are repugnant to the U.S. Constitution by reason of being overbroad as written, and repugnant as applied in the instant case?

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Mr. John Hanyok respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Commonwealth of Virginia.

## OPINIONS BELOW

The Virginia Court of Appeals decision is published at Hanyok v. Hanyok, 2002 VA 544 (VACA, 2002) Record No. 1754-01-4. (App. A) The orders in controversy concerning custody and visitation are contained in the final decree of divorce entered June 8, 2001, by the Circuit Court for the County of Fairfax, Virginia. Excerpts are reprinted as App. B.

## STATEMENT OF JURISDICTION

Petitioner timely appealed to the court of last resort, the Supreme Court of Virginia, and was denied review by Order of that court dated November 10, 2002. (App. C) Petitioner's subsequent petition to the Virginia Supreme Court for a rehearing was denied by Order dated February 28, 2003. (App. D) The jurisdiction of the United States Supreme Court now is invoked under 28 U.S.C. § 1257(a).

## STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

**CODE OF VIRGINIA § 20-124.2.** Court-ordered custody and visitation arrangements, which in pertinent part states:

> A. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide prompt adjudication, upon due consideration of all the

facts, of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter. The court may enter an order pending the suit as provided in § *20-103*. The procedures for determining custody and visitation arrangements shall insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members. Mediation shall be used as an alternative to litigation where appropriate. When mediation is used in custody and visitation matters, the goals may include development of a proposal addressing the child's residential schedule and care arrangements, and how disputes between the parents will be handled in the future.

B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

**CODE OF VIRGINIA § 20-124.3** Best interests of the child; visitation.

In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § *20-103*, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

2. The age and physical and mental condition of each parent;

3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;

5. The role which each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with

the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. Any history of family abuse as that term is defined in § *16.1-228*; and

10. Such other factors as the court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis of the decision either orally or in writing. (1994, c. 769; 1999, c. 634; 2000, c. 466.)

**U.S. Const. Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**U.S. Const. Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const. Amendment IX**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**U.S. Const. Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## REASONS FOR GRANTING THE PETITION

The statutes in controversy do not restrict judicial discretion sufficiently to safeguard against violations of fundamental liberty interests protected and guaranteed by the United States Constitution. As written the Virginia child custody and visitation statutes are repugnant to the U.S. Constitution and inconsistent with the prior decisions of the U.S. Supreme Court. The statutes in controversy are overbroad as written and do not limit judicial discretion to conform with the overarching protections of the parent-child relationships found in the decision of this Court. The result is that application of the relevant Virginia statutes, as in the instant case, results in wholesale violations of constitutionally guaranteed human rights – namely, a parent's freedom and right to associate with his minor children and to participate meaningfully in the raising and upbringing of his children. These rights have been held by the United States Supreme Court to be even more precious than any property rights.

In determining whether or not to grant certiorari the Court need to only consider one threshold question: Whether the "best interests of the child" standard set forth in the Virginia custody statutes on its face, and as construed, may sometimes be applied in derogation of the fundamental, Constitutionally guaranteed liberty interest of parents in maintaining meaningful relationships with their children, absent evidence of a clear and compelling state interest concerning the children's health or safety?

In the instant case appealed from, there is no evidence of record or finding by the Court to justify application of the best interests of the child standard in a manner which results in the massive destruction of the appellant parent's

fundamental liberty interest in maintaining parental consortium with his children. When a well established evidentiary rule lacks sufficient safeguards to prevent application in such a manner that it overrides a constitutionally guaranteed right, the negative costs to the individual appellant and to society are too great for the Court to defer review of the question presented.

## STATEMENT OF THE CASE

While entertaining a motion for visitation enforcement, the trial court *sua sponte*, and without identifying any vital or compelling state interest for doing so, imposed draconian limitations on the father's physical contact and relationship with his children, by which the trial court restricted the appellant father's contact with his children to merely "dinner every two weeks." [Record at 1034, 1042, Order dated June 8, 2001; and TR. at 1000-01, transcript of trial judge's bench orders of April 26, 2001]. Petitioner noted his Constitutional objections [preserved in the record at TR 1026] and timely noted his appeal.

The Virginia Court of Appeals upheld the trial court ruling [*Hanyok v. Hanyok*, 2002 VA 544 (VACA, 2002) Record No. 1754-01-4] and then denied a petition for re-hearing *en banc* – with the Virginia Supreme Court acting in like manner, denying both the petition for hearing and petition for reconsideration [17a, 18a]. This petition for writ of certiorari from the state court of last resort follows:

The relevant custody and visitation statutes, set forth in § 20-124.2 and § 20-124.3 of the Code of Virginia (1950, *as amended*) are repugnant to the U.S. Constitution, both on their face and as applied in the instant case. The statutes place

no limitation on the exercise of unbridled judicial discretion, even when that discretion is exercised in direct contravention and derogation of a fundamental liberty interest. The failure of the statutes to limit the unfettered exercise of judicial discretion, even when the "best interests of the child" standard is in conflict with a fundamental liberty interest, renders the statutes overbroad and fatally defective.

Petitioner argues that these same statutes violate the Constitutional rights of both the father and the children to have their most important relationships afforded the highest levels of Constitutional protection. Absent evidence of a compelling state interest (such as a showing of abuse or neglect), the "best interests of the child" standard may never be applied in a manner grossly inconsistent with a parent's fundamental liberty interest in maintaining consortium with their children. Yet the instant case demonstrates both the fatally flawed, unconstitutional construction of the Virginia custody statutes both on their face and in their manner of application.

As applied in the inferior courts, the petitioner-father's parental rights were unconstitutionally restricted to a point just short of a *de facto* termination of parental rights, without any showing whatsoever of a compelling state interest which could justify such extraordinary limitations on petitioner-father John Hanyok's association with his children, Ryan and Daniel. Arguing the case from an evidentiary standpoint alone, it is virtually impossible to see how visitation rights consisting merely of "dinner every two weeks" with the children – meets a satisfactory definition of "a meaningful relationship" within the confines of the Virginia statutes (although one cannot help but contemplate such a query) As a matter of constitutional law, however, the issue before

this court is whether these statutes permit exercise of unfettered judicial discretion to a degree which provides no protection for the primacy of the parent-child relationship.

A set of statutory guidelines, more particularly statutes entitled "The Best Interests of the Child," that are tempered with opt-out clauses such as "as appropriate" or "as the court deems" or "if the court deems" as evidenced throughout § 20-124.2 and § 20-124.3 of the Code of Virginia, cannot even be remotely considered constitutional on the face, let alone considered to be constitutional in the administration of the same. As one esteemed Supreme Court Justice said upon his return from Germany after World War II, "Total unanimity of opinion leads to total unanimity in the graveyard." In like manner, total discretionary authority in the court will lead to total destruction of the Rule of Law.

Equally repugnant is the idea that any "Best Interests of the Child" laws could remotely be considered to be in the best interests of the child if they result in an outcome that essentially terminates or abrogates a child's relationship with a fit and loving parent – and in the instant case, an exceptional parent – according to the record.

Moreover, when no party has moved the Court to restrict a parent's relationship with the children – and the Court, of its own volition – decides to restrict that relationship, according to law, it can only be a matter of "vital and compelling state interest" by which the judge makes his ruling. Yet, no vital or compelling state interest was identified other than the fact that the Virginia Court of Appeals asserted that such a ruling was allowable under the existing statutes.

"There is no doubt that constitutional principles must be strictly observed and rigorously applied in cases involving parent-child relationships, because these intimate relationships are constitutionally protected." *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972). Following *Yoder* and its progeny, virtually all state courts recognize the underlying strength of parental rights, as articulated for example by a state court in *Doe v. Irwin*, 441 F. Supp. 1247 (D.C. Michigan) (1985):

> The rights of parents to the care, custody and nurture of their children is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by this amendment (First) and Amendments 5, 9, and 14.

Narrow tailoring is required when fundamental rights are involved. Thus, the state must show adverse impact upon the child before restricting a parent from the family dynamic. "The right of a parent not to be deprived of parental rights without a showing of unfitness, abandonment or substantial neglect is so fundamental and basic as to rank among the rights contained in this Amendment (Ninth) and Utah's Constitution, Article 1 § 1." *In re U.P.*, 648 P.2d 1364; Utah (1982). Under the precedent now set by the rulings in the instant case, Virginia's statutes clearly do not require this narrow tailoring, rendering the statutes unconstitutional.

Moreover, in the instant case, not only was there a lack of unfitness, abandonment, or neglect – the evidence shows that the father was an exceptional father, even according to

the mother. What constitutional statute would allow an exceptional father to have his parental rights all but completely terminated? The existing statutes in questions cannot be squared against the Constitutional protections afforded all citizens of the United States. "No bond is more precious and none should be more zealously protected by the law as the bond between parent and child." *Carson v. Elrod*, 411 F. Supp. 645, 649; DC E.D. VA (1976).

The Due Process Clause of the Fourteenth Amendment requires that severance in the parent-child relationship caused by the state occur only with rigorous protections for individual liberty interests at stake. *Bell v. City of Milwaukee*, 746 F.2d 1205; U.S. Ct. App. 7th Cir. WI (1984).

Even going beyond the right of a parent and child to have their core relationship maintained, the U.S. Supreme Court has held that "freedom of choice in matters of family life is a fundamental liberty interest" protected by the U.S. Constitution through vigorous application of the protections of the Fourteenth Amendment's rights of due process. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). One of the liberties recognized within the context of freedom of choice in family matters is the right of the parent and children to form, maintain, shape, and cultivate their ongoing relationships. *Quilloin v. Walcott*, 434 U.S. 246 (1978). This fundamental liberty interest, which the Court variously refers to as the right of parental autonomy or the right of family integrity, is not diminished because the nuclear family has been fractured by divorce, separation, or if the parents never married. *Lehr v. Robinson*, 463 U.S. 248, 261-62 (1983); *See Caban v. Mohammed*, 441 U.S. 380 (1979). In emphasizing the importance of the fundamental liberty

interests at issue here, the Supreme Court has opined that a parent's right to the "companionship, care, custody and management of his or her children" is an interest "far more precious" than any property right. *May v. Anderson*, 345 U.S. 528, 533 (1952).

Once a right has been determined to constitute a fundamental liberty interest, the government must be extraordinarily circumspect in taking any action to impair or diminish that interest. A visitation order by nature impugns the fundamental liberty interest enjoyed by one parent in the care, nurturance, and upbringing of his or her children. Once this happens, the ordinary level of judicial review of state actions, the rational basis test, is insufficient for evaluating the legitimacy of the state action. Instead, the judicial body reviewing the state action (whether by an executive agency or by a trial court) is required to utilize the most exacting standard of review, the strict scrutiny test. That standard is nowhere to be found in the instant case.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT S. GANEY
*Attorney for Petitioner*
7991 Saint Paul's Church Road
P.O. Box 174
Hanover, Virginia 23069
(804) 537-5389